

**KEOKUK JUNCTION RAILWAY CO.**

1318 S. JOHANSON ROAD  
PEORIA, ILLINOIS 61607  
(309) 697-1400



September 18, 2006

**VIA HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

217556

RE: STB Finance Docket No. 34918  
*Keokuk Junction Railway Co., d/b/a Peoria & Western Railway — Lease and  
Operation Exemption — BNSF Railway Co.*

**EXPEDITED CONSIDERATION REQUESTED**

Dear Secretary Williams:

I am enclosing herewith an original and eleven copies of the Request of Keokuk Junction Railway Co., d/b/a Peoria & Western Railway ("PWRY") to lift the housekeeping stay that was imposed on this proceeding by a Chairman's Order dated August 10, 2006.

Please acknowledge the receipt and filing of the enclosed reply by time stamping the eleventh copy and returning it to the courier for return delivery to the offices of Baker and Miller, PLCC. If there are any questions about this matter, please contact me directly, either by telephone: (309) 697-1400 or by e-mail: lakemper@mtco.com.

Respectfully submitted,

Daniel A. LaKemper  
Attorney for Keokuk Junction Railway Co.  
d/b/a Peoria & Western Railway

cc: All Parties of Record

ENTERED  
Office of Proceedings

SEP 18 2006

Part of  
Public Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. 34918**

**KEOKUK JUNCTION RAILWAY CO.  
d/b/a PEORIA & WESTERN RAILWAY  
— LEASE AND OPERATION EXEMPTION —  
BNSF RAILWAY COMPANY  
BETWEEN VERMONT AND FARMINGTON, ILLINOIS**

**REQUEST TO LIFT HOUSEKEEPING STAY**

**EXPEDITED CONSIDERATION REQUESTED**



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**Attorney for Keokuk Junction Railway Co.,  
d/b/a Peoria & Western Railway**

**DATED: September 18, 2006**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. 34918**



**KEOKUK JUNCTION RAILWAY CO.  
d/b/a PEORIA & WESTERN RAILWAY  
— LEASE AND OPERATION EXEMPTION —  
BNSF RAILWAY COMPANY  
BETWEEN VERMONT AND FARMINGTON, ILLINOIS**

**REQUEST TO LIFT HOUSEKEEPING STAY**

**EXPEDITED CONSIDERATION REQUESTED**

Keokuk Junction Railway Co., d/b/a Peoria & Western Railway (“PWRY”) hereby respectfully requests that the Board lift its housekeeping stay order of August 10, 2006. The existence of the housekeeping stay has prevented PWRY from consummating the transaction encompassed by PWRY’s Notice of Exemption until further order of the Board and has prevented PWRY and BNSF Railway, Inc. (“BNSF”) from consummating the proposed transaction.

The Board’s order of August 10, 2006, was issued the same day that Ameren Energy Fuels and Services Company (“Ameren”) filed a Motion to Hold Verified Notice of Exemption in Abeyance. The Housekeeping Stay is no longer warranted. PWRY has provided Ameren with the information necessary to assess the impact of the proposed transaction on it. PWRY has explained to Ameren that it does not control pricing to Ameren’s Duck Creek Power Plant

("Duck Creek Plant" or "Duck Creek") and merely receives a fixed division from BNSF. Thus, although KJRY/PWRY will physically be the only carrier that serves the Duck Creek Plant if the transaction is consummated,<sup>1</sup> KJRY/PWRY will serve merely as a shortline carrier providing Ameren with access to several line-haul carriers. BNSF will set the rates for coal and other movements to the Ameren plant over the Leased Line, and KJRY/PWRY will have no role in that process. Rather, KJRY/PWRY receives a fixed division from BNSF. PWRY acts as a handling line carrier and has no pricing power. As such, the basis for concern expressed by Ameren is not valid. The simple fact is that the notice was not misleading and that there is no basis for its rejection, revocation, or the continued existence of the housekeeping stay. Moreover, as will be shown below, the Board's stay imposes financial hardship on PWRY. For these reasons, the Board should require lift the Stay, or, alternatively, require Ameren to promptly to clarify its position, and in so doing, the Board should provide a date certain for lifting its housekeeping injunction, if it is not lifted immediately.

### **BACKGROUND**

By notice filed on August 4, 2006, PWRY invoked the class exemption at 49 CFR 1150.41, et seq., to lease and to operate track owned by the BNSF Railway Company ("BNSF") between Vermont (milepost 94.3) and Farmington (milepost 52.20), in Fulton County, IL. The line consists of approximately 42.1 miles of main-line trackage and the industrial spur near Dunfermline that serves Ameren's Duck Creek Plant.

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<sup>1</sup> The Duck Creek Plant is currently served by a UP/KJRY movement over a line of railroad which Ameren built to provide competition to BNSF, which prior to the build-out was the only carrier capable of serving the Duck Creek Plant. It is this line that BNSF proposes to lease to KJRY. As a result, KJRY will be the only carrier capable of physically serving the plant via the two different routes.

By petition filed on August 10, 2006, Ameren asked the Board to hold the proceeding in abeyance to allow Ameren to inquire into the details of the PWRY-BNSF lease. Ameren argued that discovery and a stay were needed to permit Ameren and the Board time to determine whether PWRY should be permitted to proceed under the class exemption procedures. Ameren's Motion also alleged it was given "inconsistent information" about the transaction and expressed a concern that the transaction "may result in" competitive harm to Ameren's Duck Creek Plant. In connection with its request to delay the transaction, Ameren requested a protective order to facilitate obtaining a copy of the PWRY-BNSF lease.

In a Chairman's decision served on August 10, 2006, the Board imposed a "housekeeping stay" in this proceeding, suspending the effectiveness of PWRY's exemption until the Board issued a further order. By its wording, the decision enjoins PWRY from undertaking the proposed transaction indefinitely, until such time as the Board can fully consider the issues raised by Ameren.

On August 25, 2006, the Board served a decision granting Ameren's request for a protective order enabling it to obtain provisions of the confidential PWRY-BNSF Lease.<sup>2</sup>

PWRY obtained the consent of BNSF to release to Ameren, under the Protective Order, a redacted version of the otherwise confidential Lease Agreement. Both Ameren's outside counsel and its in-house counsel were provided a copy of this document. Certain highly confidential financial arrangements between PWRY and BNSF were redacted, as well as certain other provisions, at the request of BNSF. An unredacted copy of the Lease Agreement (with the exception of those certain dollar figures) is herewith provided to the Board, under seal. The

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<sup>2</sup> On September 1, 2006, the Board served notice of PWRY's invocation of the class exemption, which indicated that the exemption would take effect upon further order of the Board.

latter document is not being provided to Ameren. PWRY asks, pursuant to this Request, that the Board make an “in-camera” examination of the Lease Agreement, to determine whether the redacted text is relevant to Ameren’s concerns.<sup>3</sup>

## **ARGUMENT**

Board-imposed “housekeeping stays” are no small matter, particularly to the party or parties who are prevented from undertaking the stayed transaction. Normally, the Board requires a party seeking a stay to meet the Holiday Tours standards. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841,843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). There are occasions, however, such as here, where the Board imposes a “housekeeping stay” without relying on that standard. In the context of class exemption proceedings, such “housekeeping stays” appear to be used in instances where a party or the Board lacks sufficient information to ensure that the transaction qualifies for the class exemption process and to ensure that any valid concerns over the impact of a transaction subject to the Board’s licensing authority are adequately addressed before allowing the exemption to take effect. Once the information has been provided and examined, the housekeeping stay is normally lifted. Now that PWRY has provided the requested information, to the extent Ameren desires the transaction to remain stayed, Ameren should be required to meet the Holiday Tours test. Absent meeting that test, the exemption should go into effect and Ameren should be required to seek its revocation if it continues to believe the transaction does not meet the class exemption requirements.

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<sup>3</sup> A copy of the redacted version submitted to Ameren is also enclosed under seal so the Board can see that Ameren was provided with all of the substantial information necessary for Ameren to assure itself that it was not losing competitive rail service as a result of the transaction. The

PWRY and BNSF have provided wholly consistent and factual information about this transaction to Ameren and are now doing so, under seal, to the Board itself. This information clearly shows that the transaction will not result in any competitive harm to Ameren's Duck Creek facility. In fact, the transaction will enhance Duck Creek's service by creating a neutral shortline carrier that will maintain both lines into the facility and operate them at a higher level of service than that which the Class I carriers could provide or have provided.

Ameren's major concern seems to be that the joint PWRY/BNSF letter of July 14, 2006 (attached to Ameren's Motion) states that "PWRY is a handling line carrier for BNSF, which means that BNSF will continue to be able to set transportation prices from, to and via the PWRY wherever BNSF is in the route. As a handling line carrier, PWRY will not appear in the pricing route...." Ameren points to the statement in the exemption notice that PWRY will operate, maintain and provide "all rail common carrier services on the line pursuant to the Lease Agreement between PWRY and BNSF," and claims that "the clear inference" is that PWRY "will have total autonomy over the leased line." The statement makes no such inference. On the contrary, it clearly states that PWRY will operate under its Lease Agreement. As the Board can see from reviewing Articles 17 and 18 in the Lease Agreement, BNSF will continue to have full pricing authority, and PWRY will operate as a handling line carrier for BNSF. There is nothing inconsistent about the statement, nor is there anything confusing or novel about this arrangement.

Ameren also points to a sentence in the joint letter that "PWRY is a member of the Pioneer Railcorp family of shortlines that includes Keokuk Junction Railway and several other shotlines," and then professes surprise that PWRY is a trade name of KJRY. This, of course,

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Board can easily tell from the unredacted version that PWRY is receiving only a fixed division and has no pricing power with respect to the BNSF movement.

ignores the very first sentence of that same letter, which clearly states “The BNSF Railway Company (“BSNF”) and the Keokuk Junction Railway Co., d/b/a Peoria & Western Railway (“PWRY”) are pleased to announce.....” There is no inconsistency between the letter and the Exemption Notice.

The transaction at issue, in fact, requires PWRY to maintain Ameren’s competitive access via the BNSF line, which has no other traffic at this time. There was a distinct possibility prior to the conclusion of this Lease that this line would deteriorate, or even be abandoned. The lease prevents that from occurring. It allows BNSF to shed the costs associated with maintaining the line and the costs associated with switching, loading, and unloading traffic into and out of the Duck Creek Plant while at the same time focusing on providing the line haul movement so that it can better compete against UP, and the other line-haul carriers<sup>4</sup>. In exchange for PWRY’s taking on the costs, BNSF will pay PWRY a fixed fee subject only to a standard cost based escalation factor. PWRY receives this fee on a per-car basis regardless of market demand or market conditions, PWRY has no power to adjust it or change it without BNSF’s consent.

As the Board can clearly see, BNSF retains all pricing authority, and KJRY is, as was represented, merely a handling line carrier. Moreover, Sections 5.2 and 23.5, which make specific reference to Ameren, and the importance of Ameren’s business, provide the Duck Creek facility with assurances of service levels that it otherwise would not have.

PWRY has attempted to work with Ameren to resolve its concerns. Unfortunately, that effort has not been productive, to date. On September 8, 2006, Ameren’s outside counsel sent PWRY a letter that, while largely devoted to complaining about the redactions, makes the

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<sup>4</sup> In addition to UP, KJRY interchanges with CN/IC, NS and the other line-haul carriers serving Peoria who could provide potential sources of coal deliveries to the Ameren Duck Creek plant.



following statement, “After reviewing the portions of the agreement that were not redacted, I continue to have concerns regarding the impact that the lease will have on Ameren and the competitive situation for rail service at its Duck Creek plant.” None of those alleged concerns were in any way explained.<sup>5</sup> The Board can read the Lease Agreements related to rates and service for itself. There is no rational construction of the Lease, other than to conclude that BNSF retains all pricing authority. PWRY serving as a handling line carrier will have no adverse impact on competition.

Further, as the Board just last Friday found in South Plains Switching, Ltd., South Plains Switching, Ltd. Co.—Acquisition Exemption—BNSF Railway Company, STB Finance Docket No. 33753 (Sub-No. 1)(STB served Sept. 14, 2006), there are limited grounds for rejection and/or revocation of operating exemptions. Ameren has the burden of proof to show that such grounds exist, and they have not done so.

Although the lease will not harm Ameren’s access to competitive rail service in any way, the continuation of this Stay, on the other hand, will impose financial hardship on PWRY, and may, in fact, be detrimental to the competitive access Ameren so desperately wants to preserve. PWRY’s lease was due to take effect over a month ago. The timing was designed to give PWRY sufficient time to perform needed rehabilitation on the Line (which has not been used in several months), before winter weather makes such work difficult or impossible. If this Stay is not lifted soon, and Ameren were to elect to receive coal via BNSF at the conclusion of its current delivery contract, there is a substantial possibility that the Line would not be restored to operating

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<sup>5</sup> The notion that BNSF, knowing full well that KJRY is also the delivering shortline partner for the competing UP move, would enter into a lease that would deliberately impair BNSF’s ability to compete against UP is unrealistic and Ameren’s concerns are simply misplaced.

condition in time to make those deliveries. In addition, PWRY intends to reactivate non-Ameren customers on the Line, and every day that the Stay remains in effect is one more day that PWRY loses potential revenue from those customers.<sup>6</sup>

PWRY was hoping that once it had provided Ameren with a copy of the redacted lease that Ameren would voluntarily request that the housekeeping stay be lifted. Unfortunately, that has not yet occurred. In addition, PWRY has called Ameren's in-house counsel to discuss any additional concerns they may have. PWRY hopes that Ameren will soon realize that its concerns were misplaced. The redacted Lease Agreement should have resolved any legitimate concern over the alleged inconsistencies between the joint letter and the Notice of Exemption. The redacted portions, as the Board can see, are not relevant to any competitive concerns. Ameren may, in order to gain some advantage in negotiations with BNSF (and/or BNSF's competitors), or just out of idle curiosity, want to see the entire unredacted Lease Agreement, but it is not necessary to resolve the limited issues before the Board. If Ameren were to object to one of those redacted provisions, to what end would it lead? Ameren cannot rewrite the Lease Agreement to suit itself.<sup>7</sup> The only question is whether the Notice of Exemption is proper, and, in that regard there can be little debate.

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<sup>6</sup> This is not a speculative proposal. KJRY has a history of reactivating dormant customers. When KJRY restored service on the former west end of the TP&W, which will connect with this Line at Canton, Illinois, it immediately began a marketing campaign that resulted in the resumption of shipping by several on-line customers.

<sup>7</sup> Ameren should not be allowed to see the actual division amount. Doing so would disadvantage BNSF, PWRY, and the other line-haul carriers in their negotiations as it would allow Ameren the ability to manipulate pricing. If that is Ameren's goal, it is improper.

PWRY remains ready and willing to address any legitimate concerns Ameren articulates. It is improper, however, to leave this proceeding in limbo on vague and baseless statements, based on a Housekeeping Stay. Ameren should specify their concerns or step aside.

### **CONCLUSION**

Board precedent does not support the continuation of a Housekeeping Stay once substantive information has been given to the requesting party, and no specific concerns have been articulated. The continuation of this Stay will materially harm PWRY, if not Ameren as well, and it is not warranted under the circumstances. There is no basis to find that the Notice was in any way misleading, or to find that PWRY has any pricing authority that it could use to disadvantage Ameren's ability to use either BNSF, or any other line-haul carrier. PWRY, BNSF, and the language of the Lease Agreement clearly state that PWRY is only a handling line carrier, and there is no basis for any other conclusion. PWRY asks that the Board examine the redacted Lease Agreement provided to Ameren, and also examine, "in camera," the unredacted Lease Agreement, to confirm these facts. PWRY then asks that the Stay be lifted immediately, or, in the alternative, that Ameren be required to promptly clarify its position and meet the Holiday Tours test if it desires to continue to have the stay remain in place.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel A. LaKemper", written in a cursive style.

Daniel A. LaKemper

Attorney for Keokuk Junction Railway Co. d/b/a  
Peoria & Western Railway

September 18, 2006

## **CERTIFICATE OF SERVICE**

I, Daniel A. LaKemper hereby certify that on September 18, 2006, I caused a copy of the foregoing Request of Keokuk Junction Railway Co. d/b/a Peoria & Western Railway (except for the confidential materials) to be served by first class mail, postage prepaid, or by more expeditious service upon all parties of record.

A handwritten signature in black ink, appearing to read "Daniel A. LaKemper", written in a cursive style.

Daniel A. LaKemper